

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO:

State of Montana v. Abbott Labs., Inc., et al.,
D. Mont. Cause No. CV-02-09-H-DWM

**PLAINTIFF STATE OF MONTANA'S MOTION TO FILE ITS JOINDER IN CLASS
PLAINTIFFS' (1) MOTION TO COMPEL B. BRAUN OF AMERICA AND (2)
SUPPLEMENT TO THEIR OPPOSITION TO B. BRAUN'S MOTION TO DISMISS**

Plaintiff, the State of Montana, respectfully moves this Court for an order granting its Motion To File Its Joinder In Class Plaintiffs' (1) Motion To Compel B. Braun Of America And (2) Supplement To Their Opposition To B. Braun's Motion To Dismiss. This Motion is based upon the record, file and pleadings in this matter, as well as the attached Joinder In Class Plaintiffs' (1) Motion To Compel B. Braun Of America And (2) Supplement To Their Opposition To B. Braun's Motion To Dismiss.

On June 10, 2004, the Court denied defendant B. Braun of America's ("BBA") Motion to Dismiss the State of Montana's claims against it, ordered discovery against BBA to proceed, and ordered Montana to "respond to the issues of personal jurisdiction and whether the named entity is a proper Defendant for the drugs listed by August 24, 2004." On February 24, 2004, the Court in the private class action proceedings entered a similar order, directing the plaintiffs to "respond to the issues of personal jurisdiction and whether the service of B. Braun of America relates back to the service of B. Braun Medical, Inc.," also by August 24, 2004.

Because BBA did not provide the necessary discovery, the class plaintiffs, in coordination with Montana counsel, on August 24th filed a Motion to Compel BBA and a supplement to their Memorandum in Opposition to BBA's Motion to Dismiss the Amended Master Consolidated Complaint.

Montana drafted a Joinder in Class Plaintiffs' (1) Motion to Compel B. Braun of America and (2) Supplement to Their Opposition to B. Braun Motion to Dismiss (the "Joinder") for filing that same day. However, it just came to Montana's attention that the Joinder was not filed with the Court on August 24th as intended. BBA filed a renewed motion to dismiss the State of Montana's Second Amended Complaint on September 10, 2004, asserting, among other things, that Montana apparently conceded that BBA should be dismissed because Montana had not taken any discovery of BBA. Montana's counsel were confused by this assertion given that the Joinder explained that Montana counsel had been coordinating with putative class counsel on BBA discovery issues.

Upon investigating the matter, we discovered that Hagens Berman filed six documents with the Court on August 24th – all of which relate to BBA – and it appears that the Montana Joinder was inadvertently not included.

For these reasons, the State of Montana respectfully requests the Court grant it leave to file its attached Joinder in Class Plaintiffs' (1) Motion To Compel B. Braun Of America And (2) Supplement To Their Opposition To B. Braun's Motion To Dismiss. No prejudice has accrued to B. Braun as a result of this short delay.

By /s/ Steve W. Berman

DATED: September 21, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing **PLAINTIFF STATE OF MONTANA'S MOTION TO FILE ITS JOINDER IN CLASS PLAINTIFFS' (1) MOTION TO COMPEL B. BRAUN OF AMERICA AND (2) SUPPLEMENT TO THEIR OPPOSITION TO B. BRAUN'S MOTION TO DISMISS** to be served on all counsel of record electronically on September 21, 2004, pursuant to Section D of Case Management Order No. 2.

By /s/ Steve W. Berman
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The class plaintiffs have attempted to take discovery of B. Braun of America by noticing the deposition of BBA pursuant to Fed. R. Civ. P. 30(b)(6) to inquire into "jurisdictional issues," including all AWPIDs manufactured, distributed, marketed or sold by B. Braun of America, Inc., B. Braun McGaw, Inc. and B. Braun Medical, Inc. That deposition was taken on August 17, 2004. Because BBA failed to conduct the due diligence necessary to testify as to matters known or reasonably available to BBA and because BBA, through its counsel, refused to answer certain questions because the BBA designee was also an attorney for BBM (and, in particular, questions

about what AWPIDs were sold by which Braun entities), the plaintiffs were unable to discover the information requested. Therefore, plaintiffs have moved to compel BBA to make a supplemental 30(b)(6) designation for the areas of inquiry for which BBA either failed to inquire or refused to answer.

Counsel for the State of Montana have been cooperating with counsel to the putative class on this issue. Accordingly, the State of Montana joins in the motion and briefing submitted by the class action plaintiffs and requests that the Court also provide the State of Montana with the same relief. The Court has authorized discovery against BBA to proceed and has ordered Montana to determine whether BBA is a proper Defendant for the drugs listed in the complaint, yet BBA will not provide the answer to this critical inquiry. The Court should grant the motion to compel and provide Montana with a later opportunity to “respond to the issues of personal jurisdiction and whether the named entity is a proper Defendant for the drugs listed” after BBA has provided the necessary information.

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